16-CV-5261 (AJN)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WELLINGTON FELIZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, BRONX-LEBANON HOSPITAL CENTER,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF THE CITY'S PARTIAL MOTION TO DISMISS

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for the City of New York
100 Church Street
New York, N.Y. 10007

Of Counsel:
Jeffrey Loperfido
Carolyn Kruk
Elizabeth DeGori
Matter No. 2016-033373

TABLE OF CONTENTS

TABLE OF AUTHORITIES .... **iii**
PRELIMINARY STATEMENT **1**
STATEMENT OF FACTS **2**
ARGUMENT **4**

STANDARD OF REVIEW 4

POINT I : PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE OR DECLARATORY RELIEF 6

POINT II : PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES SHOULD BE DISMISSED 11

POINT III : PLAINTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED FOR FAILING TO COMPLY WITH THE NEW YORK GENERAL MUNICIPAL LAW 12

CONCLUSION **17**

TABLE OF AUTHORITIES

Page(s)

Cases

Ambrose v. City of New York,
623 F. Supp. 2d 454 (S.D.N.Y. 2009)....4

Amnesty Int'l USA v. Clapper,
667 F.3d 163 (2d Cir. 2011)....8

Andino v. Fischer,
698 F. Supp. 2d 362 (S.D.N.Y. 2010)....11

Ashcroft v. Iqbal,
556 U.S. 662 (2009)....4

Best v. New York,
468 N.Y.S.2d 7 (N.Y. App. Div. 1st Dep't 1983) 15

Broder v. Cablevision Sys. Corp.,
418 F.3d 187 (2d Cir. 2005)....5, 14

Brown v. Metro. Transport. Auth.,
717 F. Supp. 257 (S.D.N.Y. 1989) 12

Buie v. City of N.Y.,
No. 12-CV-4390, 2015 U.S. Dist. LEXIS 147642 (E.D.N.Y. Oct. 30, 2015)....15, 16

Chambers v. Time Warner, Inc.,
282 F.3d 147 (2d Cir. 2002)....5

City of Los Angeles v. Lyons,
461 U.S. 95 (1983)....8, 9

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981)....11

Corr. Officers' Benevolent Ass'n v. City of New York,
No. 15-CV-5914, 2016 U.S. Dist. LEXIS 78554 (S.D.N.Y. June 16, 2016) 4

Curry v. City of New York,
No. 10-CV-5847, 2010 U.S. Dist. LEXIS 135461 (E.D.N.Y. Dec. 22, 2010) 8

DiFolco v. MSNBC Cable L.L.C.,
622 F.3d 104 (2d Cir. 2010)....5

Elliot-Leach v. New York City Dep't of Educ.,
No. 15-CV-5982, 2016 U.S. Dist. LEXIS 113058 (E.D.N.Y. Aug. 12, 2016)....14

Gilliard v. City of New York,
No. 10-CV-5187, 2013 U.S. Dist. LEXIS 18180 (E.D.N.Y. Feb. 7, 2013)....15, 16

Harper v. City of New York,
424 F. App'x 36 (2d Cir. 2011) 4

Harris v. Howard,
No. 08-CV-4837, 2009 U.S. Dist. LEXIS 105860 (S.D.N.Y. Oct. 30, 2009) 5

Harty v. Simon Prop. Group, L.P.,
428 F. App'x. 69 (2d Cir. 2011) 7, 16

Ivani Contracting Corp. v. City of New York,
103 F.3d 257 (2d Cir. 1997)..11

Katt v. City of New York,
151 F. Supp. 2d 313 (S.D.N.Y. 2001)..11

Kemp v. Cnty. of Suffolk,
878 N.Y.S.2d 135 (N.Y. App. Div. 2d Dep't 2009) 15

Kreisler v. Second Avenue Diner Corp.,
731 F.3d 184 (2d Cir. 2013)..7

LaMagna v. Brown,
474 F. App'x 788 (2d Cir. 2012) 4

Livermore v. City of New York,
No. 08-CV-4442, 2011 U.S. Dist. LEXIS 4763 (S.D.N.Y. Jan. 13, 2011) 4

MacIsaac v. Town of Poughkeepsie,
770 F. Supp. 2d 587 (S.D.N.Y. 2011)...8

Maggio v. Palmer,
810 F. Supp. 50 (E.D.N.Y. 1993) 12, 16

Marino v. Jonke,
No. 11-CV-430, 2012 U.S. Dist. LEXIS 78661 (S.D.N.Y. Mar. 30, 2012)................13, 15, 16

McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck,
370 F.3d 275 (2d Cir. 2004)...6

Naughright v. Weiss,
826 F. Supp. 2d 676 (S.D.N.Y. 2011)...11

O'Shea v. Littleton,
414 U.S. 488 (1974)..8

Ortiz v. Westchester Med. Ctr. Health Care Corp.,
No. 15-CV-5432, 2016 U.S. Dist. LEXIS 161777 (S.D.N.Y. Nov. 18, 2016)........................10

Rapa v. City of New York,
No. 15-CV-1916, 2015 U.S. Dist. LEXIS 129048 (S.D.N.Y. Sept. 25, 2015)........................10

Restivo v. Village of Lynbrook,
444 N.Y.S.2d 189 (N.Y. App. Div. 2d Dep't 1981) 15

Rose v. Cty. of Nassau,
904 F. Supp. 2d 244 (E.D.N.Y. 2012) 12

Shain v. Ellison,
356 F.3d 211 (2d Cir. 2004)...8, 9, 10

Shanahan v. Vallat,
No. 03-CV-3496, 2004 U.S. Dist. LEXIS 25523 (S.D.N.Y. Dec. 19, 2004) 12

Sharapata v. Town of Islip,
56 N.Y. 2d 332 (1982) 11

Simon v. City of New York,
No. 09-CV-1302, 2011 U.S. Dist. LEXIS 9515 (E.D.N.Y. Jan. 3, 2011) 13, 15, 16

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)...8

Williams v. City of New York,
34 F. Supp. 3d 292 (S.D.N.Y. 2014)....7, 8, 9

Wilson v. Phoenix House,
42 Misc. 3d 677 (2d Dept. 2013)....11

Statutes

42 U.S.C. § 1983....1, 11

Americans with Disabilities Act Title II....1, 7, 9, 11

New York City Administrative Code § 8-107....1, 11

New York General Municipal Law § 50-h.... passim

New York State Executive Law § 296....1, 11

Rehabilitation Act § 504....1

Other Authorities

U.S. Const. Amd. IV....1

Fed. R. Civ. P. 12(b)(1)....1, 4

Fed. R. Civ. P. 12(b)(6)....4, 5

PRELIMINARY STATEMENT

Plaintiff Wellington Feliz, a deaf man who communicates using American Sign Language, alleges that the City of New York (the "City") failed to provide him with sign language interpreter services or another auxiliary aid when he was wrongfully detained and arrested, and then hospitalized at the Bronx-Lebanon Hospital Center ("Bronx-Lebanon").

Plaintiff filed his initial Complaint on August 10, 2016. See Dkt. 5. On October 11, 2016, the City filed a motion to dismiss the Complaint in its entirety. See Dkts. 24-26. In response, and pursuant to the Court's Individual Rules, plaintiff filed an Amended Complaint. See Dkt. 29. In his Amended Complaint, plaintiff continues to allege that the City and Bronx-Lebanon violated his rights under Title II of the Americans with Disabilities Act (ADA); Section 504 of the Rehabilitation Act (RA); the New York State Executive Law § 296 (NYSHRL); the New York City Administrative Code § 8-107 (NYCHRL); and the Fourth Amendment. Plaintiff continues to assert state law claims against the City for false arrest, and assault and battery. He continues to seek compensatory and punitive damages, and injunctive and declaratory relief.

The City now moves to partially dismiss plaintiff's Amended Complaint. In particular, the City moves to dismiss plaintiff's claims for injunctive and declaratory relief pursuant to Federal Rule of Civil Procedure 12(b)(1) on the grounds that he lacks standing to seek such relief. The City also moves to dismiss plaintiff's claims for punitive damages under the ADA, RA, Section 1983, the NYSHRL, and NYCHRL as such damages are not available against a municipality. The City further moves to dismiss plaintiff's claims for false arrest (Count V) and assault and battery (Count VI) because he failed to comply with the New York General Municipal Law.

STATEMENT OF FACTS

Plaintiff Wellington Feliz is deaf and communicates using American Sign Language (ASL). See Am. Compl. ¶ 1. Plaintiff also alleges that he has tunnel vision and is limited English proficient. Id. ¶ 22.

On July 7, 2015, two NYPD officers came to plaintiff's home and "summoned Plaintiff to the door." Id. ¶ 19. Plaintiff claims that the officers did not have an ASL interpreter accompanying them, or any other auxiliary aid. Id. ¶ 20. At the same time, plaintiff acknowledges that the officers used written notes to communicate with plaintiff and "to be best of Plaintiff's knowledge, asked if he was okay." Id. ¶ 21. Plaintiff alleges that he "nodded that he was indeed all right." Id. ¶ 23. He alleges that when he attempted to use sign language, "the officers physically put his hands down to stop him." Id. ¶ 24. He further alleges that the officers observed that Plaintiff was "in no apparent distress," "was injured," and "did not display aggressive behavior." Id. ¶ 25. Plaintiff alleges that the officers returned to their vehicle. Id. ¶¶ 22-23. Plaintiff claims that he approached the officers to inquire as to why they remained outside his home, attempting to communicate with both hand gestures and written notes. Id. ¶ 28-29. Using written notes in response, the officers communicated that they had called an ambulance for plaintiff. Id. ¶ 30. Plaintiff gestured to the officers that he was "going to get someone to help him communicate." Id. ¶ 31. Plaintiff claims that when he moved towards his residence the officers grabbed plaintiff, forced him to the ground, and handcuffed him. Id. ¶¶ 32, 33. The officers did not communicate to plaintiff until that time that he was under arrest. Id. ¶ 34. Plaintiff alleges that he was restrained against his will for over an hour until the ambulance arrived. Id. ¶ 35. He alleges that during his detention he was not provided with an ASL interpreter or "an auxiliary communication device" and that he was not aware why he was restrained. Id. ¶ 36.

Plaintiff claims that plaintiff's interaction with the police officers was witnessed by "[m]ultiple" people and is "memorialized in a recording." Id. ¶ 38. In this recording, plaintiff alleges that "witnesses call out to the police officers that Plaintiff is deaf and cannot speak to which the police officers replied 'we know.'" Id. Plaintiff alleges that the officers told him to calm down and that he "sign[ed] to the camera for help" as his hands were "pulled behind his back." Id. ¶ 39. He claims that the officers "falsely informed the witnesses who congregated that Plaintiff was suicidal." Id. ¶ 80.

Plaintiff was transported by ambulance to the emergency room at Bronx-Lebanon. Id. ¶ 43. While in the ambulance, plaintiff remained handcuffed and was unable to communicate by sign language. Id. ¶ 45. No sign language interpreter or other auxiliary communication device was provided to plaintiff while he was in the ambulance. Id. ¶ 44.

Plaintiff claims that he was held overnight at Bronx-Lebanon against his will. Id. ¶ 46. During his stay at the hospital, he was transferred from the Emergency Department to the Psychiatric Ward. Id. ¶ 49. He claims that no ASL interpreter or auxiliary device was provided to him "on admission, examination, and discharge." Id. ¶ 50. At some point during plaintiff's stay at the hospital, his mother came to the hospital. Id. ¶ 52. Plaintiff's mother requested an interpreter for her son. Id. Plaintiff alleges that these requests were ignored and instead, hospital staff used his mother "as a conduit". Id. ¶¶ 53, 54.

Plaintiff alleges that he suffered "severe pain and suffering, emotional distress and anguish, humiliation, and a reasonable fear that these events would reoccur in the future." Id. ¶ 59. No charges were filed against plaintiff (id. ¶ 99), and plaintiff does not say why he was allegedly arrested. Plaintiff seeks unspecified compensatory and punitive damages as well as injunctive and declaratory relief. Id. ¶¶ 1, 91.

ARGUMENT

STANDARD OF REVIEW

Under Rule 12(b)(6), a pleading may be dismissed for "failure to state a claim upon which relief can be granted." In order to survive a Rule 12(b)(6) motion, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Harper v. City of New York, 424 F. App'x 36, 38 (2d Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))). "A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Ambrose v. City of New York, 623 F. Supp. 2d 454, 463 (S.D.N.Y. 2009) (internal alterations and quotation marks omitted). Thus, "naked assertions devoid of further factual enhancement" or "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" are insufficient to state a claim. Iqbal, 556 U.S. at 678 (internal quotations omitted) (internal alterations omitted). Additionally, an allegation that lacks a factual basis is merely "a conclusory allegation masquerading as a factual conclusion, which is insufficient to defeat a motion to dismiss." LaMagna v. Brown, 474 F. App'x 788, 790 (2d Cir. 2012) (quoting Kirch v. Liberty Media Corp., 449 F.3d 388, 398 (2d Cir. 2006)). In sum, when a plaintiff's allegations are insufficient to "nudge[] [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." Livermore v. City of New York, No. 08-CV-4442, 2011 U.S. Dist. LEXIS 4763, at *14 (S.D.N.Y. Jan. 13, 2011) (quoting Twombly, 550 U.S. at 570).

The City also moves to dismiss plaintiff's claims for injunctive and declaratory relief due to lack of standing pursuant to Rule 12(b)(1). However, "the standards for reviewing dismissals granted under 12(b)(1) and 12(b)(6) are identical." Corr. Officers' Benevolent Ass'n v. City of New York, No. 15-CV-5914, 2016 U.S. Dist. LEXIS 78554, at *5 (S.D.N.Y. June 16,

2016) (quoting Moore v. PaineWebber, Inc., 189 F.3d 165, 169 (2d Cir. 1999)). Accordingly, like a motion pursuant to Rule 12(b)(6), "[f]or purposes of ruling on a motion to dismiss for want of standing, . . . [the] court[] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Id. (citing Warth v. Seldin, 422 U.S. 490, 501 (1975)).

In considering a motion to dismiss, "a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010); see also Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) ("a court may consider 'matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit'"). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' which renders the document integral to the complaint." Chambers, 282 F.3d at 152-53. "Insofar as the complaint relies on the terms" of a document either annexed or deemed incorporated by reference, the court "need not accept its description," but may look to the document itself. See Broder v. Cablevision Sys. Corp., 418 F.3d 187, 196 (2d Cir. 2005). With respect to judicial notice, "a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including arrest reports, criminal complaints, indictments, and criminal disposition data." Harris v. Howard, No. 08-CV-4837, 2009 U.S. Dist. LEXIS 105860, at *2 (S.D.N.Y. Oct. 30, 2009).

POINT I

PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE OR DECLARATORY RELIEF

Plaintiff claims that he is entitled to a "permanent injunction" requiring NYPD officers to "provide effective communication through the use of interpreter services whether through live interpreters or auxiliary communication devices" during "on-the-street interactions with the deaf or hearing impaired" persons because "[m]oney damages are insufficient to fully address [his] claims . . . ." See Am. Compl. ¶ 116; see also the Complaint's "Wherefore Clause" at (vii) (Plaintiff seeks a "permanent injunction requiring the [NYPD] . . . to have proper training, policies, and procedures in place and to provide reasonable accommodations such as American Sign Language Interpreters or Auxiliary Communication Devices to all deaf or hearing-impaired persons in on-the street interactions with law enforcement").

Plaintiff claims that he is "likely to be engaged in the same behavior that resulted in the actions of the Defendant described above: lawfully being present in his permanent residence and not being engaged in illegal behavior, and interaction [sic] with police officers from the City of New York." Id. ¶ 120. He also claims that he is likely to "utilize one or more" of the NYPD's "public services" such as "law enforcement, emergency services, answering questions, and peaceful community assistance services." Am. Compl. ¶¶ 118, 119. He further claims that "the police officers who injured Plaintiff . . . are officers who are assigned to the precinct that serves Plaintiff's permanent residence and as such [he] is likely to have contact in the future with this police precinct." Id. ¶ 117. These allegations are insufficient to give plaintiff the requisite standing to be entitled to injunctive relief. Likewise, to the extent that plaintiff also seeks declaratory relief (see Am. Compl. ¶ 1), he also lacks the necessary standing to be entitled to this type of relief. See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d

275, 284 (2d Cir. 2004) (noting that a plaintiff who seeks declaratory relief also "cannot rely on past injury" to establish standing, "but must show a likelihood that he or she will be injured in the future").

To establish standing to seek injunctive or declaratory relief, a plaintiff must demonstrate: "1) an 'injury in fact' that is 'concrete and particularized' and 'actual and imminent, not conjectural or hypothetical'; 2) 'a causal connection between the injury and the conduct complained of'; and 3) redressability of the injury by favorable decision." Harty v. Simon Prop. Group, L.P., 428 F. App'x. 69, 71 (2d Cir. 2011) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). When seeking injunctive relief, a plaintiff "cannot rely only on past injury to satisfy the injury requirement but must show a likelihood of future harm." Id. (citing City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983)).

In the ADA context, the Second Circuit has stated that they "have previously found standing (and therefore an injury in fact) where 1) the plaintiff alleged past injury under the ADA; 2) it was reasonable to infer that the discriminatory treatment would continue; and 3) it was reasonable to infer, based on the past frequency of plaintiff's visits and the proximity of the accommodation to plaintiff's home, that plaintiff intended to return to the subject location." Kreisler v. Second Avenue Diner Corp., 731 F.3d 184, 187-188 (2d Cir. 2013) (citing Camarillo v. Carrols Corp., 518 F.3d 153, 158 (2d Cir. 2008)). In Kreisler, a claim under Title III of the ADA,[1] the Court of Appeals held "that 'plaintiffs seeking injunctive relief must also prove that the identified injury in fact presents a real and immediate threat of repeated injury.'" Kreisler,

[1] The present case asserts claims under Title II of the ADA. While the "vast majority of cases in which injunctive relief is sought under the ADA arise under Title III, which addresses public accommodations," those cases are equally applicable. As noted in Williams, "the parties have not pointed this Court to any precedent holding that the standard for determining standing is different between the two Titles, and the court has found none." Williams v. City of New York, 34 F. Supp. 3d 292, 295 (S.D.N.Y. 2014).

731 F.3d at 187 (quoting Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004)); see also Williams, 34 F. Supp. 3d at 296, n. 4 (same).

Stated otherwise, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). A plaintiff who seeks an injunction "must allege the probability of a future encounter with the defendant which is likely to lead to a similar violation of some protected right." Curry v. City of New York, No. 10-CV-5847, 2010 U.S. Dist. LEXIS 135461, at *8 (E.D.N.Y. Dec. 22, 2010) (internal citation omitted). "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" Shain, 356 F.3d at 215 (quoting O'Shea, 414 U.S. at 494).

The plaintiff bears the burden of alleging facts in his complaint sufficient to establish standing. Amnesty Int'l USA v. Clapper, 667 F.3d 163, 176-77 (2d Cir. 2011) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 569 n.4 (1992); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (quoting Warth v. Seldin, 422 U.S. 490, 518 (1975)) ("plaintiff must 'clearly . . . allege facts demonstrating' each element").

City of Los Angeles v. Lyons is the seminal case in this area. 461 U.S. 95 (1983). In Lyons, the plaintiff alleged that he feared being subjected again to an illegal chokehold, and based on the extensive use of chokeholds by the Los Angeles police, he should be afforded standing to seek injunctive relief. The Supreme Court held that the risk that the plaintiff himself would come into contact with the police and suffer a subsequent unlawful chokehold was speculative in nature and insufficient to confer equitable standing. Id. at 109; see also MacIsaac v. Town of Poughkeepsie, 770 F. Supp. 2d 587, 601 (S.D.N.Y. 2011) (plaintiff's claim that he would be stopped, arrested and subjected to a taser gun again was speculative, and injunctive relief therefore denied).

More recently, in Williams v. City of New York, the district court applied the same legal doctrine to dismiss the plaintiff's claim for injunctive relief under the ADA. Like the case at hand, Ms. Williams was deaf and alleged one past encounter with the NYPD, where she called 911 requesting assistance and was subsequently arrested. 34 F. Supp. 3d 292. The court held that Ms. Williams lacked standing to seek injunctive relief stating: "To find that Plaintiff is likely to suffer future harm from the NYPD's failure to provide sign language interpreters upon arrest or incarceration would require conjecture and speculation, which is not permissible under established precedent." Williams, 34 F. Supp. 3d at 297. The Williams court also rejected Ms. Williams argument that she was entitled to injunctive relief because the "need of hearing-impaired persons to communicate with police officers extends to peaceful or protective reasons and is not limited to the arrest context," finding that this argument did "not alter the standing analysis" because her factual assertions were speculative. See Williams, 34 F. Supp. 3d at 296-97 ("[a]lthough there is certainly some chance that the Plaintiff might find herself arrested again by police officers who do not offer her a sign language interpreter, that is the same speculative chance that the Supreme Court in Lyons and the Second Circuit in Shain found insufficient to confer standing").

Here, like in Williams, plaintiff alleges only a single interaction with the NYPD, an incident from July 2015 where he was allegedly restrained, detained, and escorted to the hospital against his will. He alleges that he was "lawfully being present in his permanent residence" when police responded to his home and allegedly violated his rights under the ADA and RA (Am. Compl. ¶ 120) and that it is likely to happen again. However, this is a purely "conjectural" or "hypothetical" fear rather than a "real and immediate" threat of a recurrent injury. Equally speculative is Plaintiff's allegation that he is "likely to use one or more" of the NYPD's services and "likely to have contact in the future with this police precinct" and the officers involved in the July 2015 incident. But plaintiff does not allege that he has used or plans to use any of NYPD's "services". Again, the only interaction that plaintiff alleges with the police is his July 2015 detention.

In short, "[t]he 'why'—the connection between a single past [interaction] and imminent future [interactions]—is still missing from Plaintiffs' [. . .] pleadings and is the obstacle to establishing standing." Ortiz v. Westchester Med. Ctr. Health Care Corp., No. 15-CV-5432, 2016 U.S. Dist. LEXIS 161777, at *22 (S.D.N.Y. Nov. 18, 2016) (denying plaintiffs' request for amend their complaint on the basis of futility as plaintiffs would still lack standing to seek injunctive relief). See also Shain, 356 F.3d at 215 (finding plaintiff failed to establish likelihood of a future encounter and arrest because he had no criminal record, had never before been arrested, and had not been rearrested or had any encounters with the police in the year between his arrest and the filing of the lawsuit); see also Rapa v. City of New York, No. 15-CV-1916, 2015 U.S. Dist. LEXIS 129048, **3-4 (S.D.N.Y. Sept. 25, 2015) (dismissing plaintiff's claim for injunctive relief premised on the police's alleged failure to procure an ASL interpreter because plaintiff's "bare allegation that he 'expects' to interact with the NYPD and Lincoln Medical Center during a visit to the City in the future . . . is not enough to establish the requisite likelihood of future injury"). Accordingly, plaintiff lacks the requisite standing to seek declaratory or injunctive relief, and his claims for such should be dismissed.

POINT II

PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES SHOULD BE DISMISSED

To the extent that Plaintiff continues to seek "punitive and/or exemplary damages" as a result of the alleged violations of his federal, state, and city-law rights (see Am. Compl. Wherefore Clause at (i)-(vi)), his claim for punitive damages fails for the following reasons. First, punitive damages are not available under Title II of the ADA. See Andino v. Fischer, 698 F. Supp. 2d 362, 385 (S.D.N.Y. 2010) (citing Barnes v. Gorman, 536 U.S. 181, 189-90 (2002)). Second, municipalities are immune from punitive damages under 42 U.S.C. § 1983. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981); Ivani Contracting Corp. v. City of New York, 103 F.3d 257, 262 (2d Cir. 1997). Likewise, case law demonstrates that plaintiff cannot recover an award of punitive damages against the City under NYCHRL and NYSHLR. See Sharapata v. Town of Islip, 56 N.Y. 2d 332, 339 (1982) (holding that punitive damages cannot be recovered against a municipality); Katt v. City of New York, 151 F. Supp. 2d 313, 345 (S.D.N.Y. 2001) (holding that punitive damages are not recoverable against the City under NYCHRL). Third, punitive damages under the NYSHRL are only available in housing discrimination cases. Wilson v. Phoenix House, 42 Misc. 3d 677, 771 (2d Dept. 2013) (citing Executive Law § 297(9)). Finally, with respect to plaintiff's state law claims for false arrest and assault and battery the Amended Complaint does not that the officers' actions were so "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" to support a punitive damages award. Naughright v. Weiss, 826 F. Supp. 2d 676, 698 (S.D.N.Y. 2011) (citing McDougald v. Garber, 73 N.Y.2d 246, 254 (1989)).

Accordingly, plaintiff's claims for punitive damages should be dismissed. See Shanahan v. Vallat, No. 03-CV-3496, 2004 U.S. Dist. LEXIS 25523, at *36 (S.D.N.Y. Dec. 19, 2004) (granting defendants' motion to dismiss plaintiffs' claim for punitive damages).

POINT III

PLAINTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED FOR FAILING TO COMPLY WITH THE NEW YORK GENERAL MUNICIPAL LAW

Plaintiff is precluded from bringing state law claims against the City because he failed to comply with the statutory preconditions to suit on state law claims. Under the New York General Municipal Law ("GML"), once requested to appear at a 50-h Hearing, the burden is on the claimant to ensure that the 50-h hearing has been rescheduled to take place prior to the expiration of the applicable statute of limitations, which is one year and 90 days. Here it is undisputed that plaintiff adjourned the initial demand for a 50-h Hearing, that he filed the instant action having never appeared for a 50-h Hearing, and that the statute of limitations for his state law claims against the City has run. For these reasons, and those that follow, the state law claims asserted by plaintiff in this action against the City are barred.

"Under New York law, a notice of claim is a condition precedent to bringing personal injury actions against a municipal corporation and its officers, appointees and employees." See Rose v. Cty. of Nassau, 904 F. Supp. 2d 244, 247 (E.D.N.Y. 2012) (citing GML § 50-e and C.S.A. Contr. Corp. v. N.Y. City School Constr. Auth., 5 N.Y.3d 189, 192 (2005)); Brown v. Metro. Transport. Auth., 717 F. Supp. 257, 259 (S.D.N.Y. 1989). Upon the filing of a notice of claim, the municipality has "the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made . . . ." GML § 50-h(1). No action may be commenced against a municipality unless the claimant has duly complied with a timely demand for examination. See Maggio v. Palmer, 810 F. Supp. 50, 51

(E.D.N.Y. 1993); see also Marino v. Jonke, No. 11-CV-430, 2012 U.S. Dist. LEXIS 78661, at *29 (S.D.N.Y. Mar. 30, 2012); Simon v. City of New York, No. 09-CV-1302, 2011 U.S. Dist. LEXIS 9515, at *50 (E.D.N.Y. Jan. 3, 2011) ("claimant's action 'may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement . . . .'") (quoting GML § 50-h(5)), adopted by 2011 U.S. Dist. LEXIS 9594 (E.D.N.Y. Feb. 1, 2011). Further, "no [such] action . . . shall be . . . maintained . . . unless . . . the action . . . [is] commenced within one year and ninety days after the happening of the event upon which the claim is based." Id. (quoting GML § 50-i).

Here, the incident forming the basis of plaintiff's claims occurred on July 7, 2015 and plaintiff filed a notice of claim on or about October 2, 2015. See Am. Compl. ¶¶ 8, 17. "Hearings pursuant to [GML] were repeatedly scheduled on December 23, 2015, February 9, 2016, and April 19, 2016 but were adjourned once by Plaintiff," and "the other times," allegedly, by the City. Am. Compl. ¶ 9. Under the GML, plaintiff was required to comply with the preconditions for suit and commence his action no later than October 4, 2016.

Because plaintiff admittedly never appeared for a 50-h Hearing, he argued, in his initial pleading, that the City "waived" its right under GML 50-h by adjourning the scheduled hearing dates. See Complaint (Dkt. 5), ¶ 9. Now, having been confronted with documentary evidence suggesting that some, if not, all of the adjournments were granted at plaintiff's request (see Memorandum of Law, dated Oct. 11, 2016, Dkt. 26, at 19-20, 20 n.4), Plaintiff admits to adjourning a scheduled hearing, but contends that the City waived its rights because "[o]n the last scheduled date when Plaintiff informed Defendant he would be present with a sign language interpreter to communicate with counsel, Defendant declined to proceed with the hearing with Plaintiff utilizing his interpreter." Am. Compl. ¶ 9. Plaintiff's position on waiver remains in conflict with the facts he alleged, the circumstances surrounding the scheduling of the 50-h hearing, and the law governing a claimant's obligations under the GML.

As an initial matter, the records concerning the City's demand for a 50-h examination and subsequent adjournments—which can be considered by the Court on this motion because they are referenced in the Complaint and integral to plaintiff's state law claims[2]—show that the City noticed a 50-h hearing on November 30, 2015 and made subsequent demands for the examination on December 28, 2015, February 9, 2016, and May 26, 2016. See Declaration of Jeffrey Loperfido in Support of the City's Partial Motion to Dismiss, dated December 2, 2016 (hereinafter "Loperfido Decl."), at Exhs. A-D. The final adjournment noticed the 50-h hearing for July 6, 2016. See id. at Exh. D. Plaintiff filed this action on July 1, 2016, while the demand for an examination was outstanding and before the date on which plaintiff contends that "Defendants declined to proceed with the hearing." Under these circumstances, plaintiff cannot plausibly allege that the City waived its right to an examination of plaintiff.[3]

But, even without considering the 50-h hearing notice and adjournments appended to this motion, the Amended Complaint sets forth sufficient factual matter to establish plaintiff's non-compliance with the GML and the resulting statutory bar. Specifically, the

---

[2] See, e.g., Broder., 418 F.3d at 196 ("Where a plaintiff has relied on the terms and effect of a document in drafting the complaint, and that document is thus integral to the complaint, we may consider its contents even if it is not formally incorporated by reference. . . . Insofar as the complaint relies on the terms of [a document] we need not accept its description of those terms, but may look to the [document] itself"); see also Elliot-Leach v. New York City Dep't of Educ., No. 15-CV-5982, 2016 U.S. Dist. LEXIS 113058, at *4 (E.D.N.Y. Aug. 12, 2016) (considering documents outside the complaint, "namely, a transcript of Plaintiff's 50-h hearing and a letter from the [EEOC]" on defendant's motion pursuant to 12(b)(6)").

[3] The fact that most, if not all, of the adjournments of the 50-h hearing appear to have been granted by the City at plaintiff's request further discredits any basis for waiver. See Loperfido Decl., Exhs. E-I. It also cannot be argued that plaintiff was unaware of the July 6, 2016 hearing date, as the minutes from that proceeding seem to reflect a decision by plaintiff not to appear conveyed after the City of New York had already incurred the cost of arranging for an attorney, a stenographer, and an interpreter to be present at the hearing. See Loperfido Decl., at Exh. J.

Amended Complaint acknowledges that a hearing was requested by the City, that plaintiff requested at least one adjournment, that additional adjournments were obtained, and that plaintiff never appeared for the examination. See Am. Compl. ¶ 9. Courts within this Circuit have repeatedly recognized that the failure to appear at a hearing (or to request an adjournment or postponement) is a "complete bar" to proceeding with state law claims against the City irrespective of the reasons why a plaintiff failed to appear, and the courts have placed the burden on the plaintiff to resolve any discrepancies in rescheduling both in keeping with the Circuit's directive to construe notice-of-claim requirements "strictly" and for the important public policy rationale that, while the City must handle the rescheduling of thousands of such hearings, a plaintiff is concerned only with his own and is in a better position to ensure that the hearing takes place. See, e.g., Buie v. City of N.Y., No. 12-CV-4390, 2015 U.S. Dist. LEXIS 147642, at *15-*17 (E.D.N.Y. Oct. 30, 2015); Gilliard v. City of New York, No. 10-CV-5187, 2013 U.S. Dist. LEXIS 18180, at *55 (E.D.N.Y. Feb. 7, 2013); Marino, 2012 U.S. Dist. LEXIS 78661, at *28-*30; Simon, 2011 U.S. Dist. LEXIS 9515, at *51 n.17; Kemp v. Cnty. of Suffolk, 878 N.Y.S.2d 135, 136 (N.Y. App. Div. 2d Dep't 2009); Best v. New York, 468 N.Y.S.2d 7, 8 (N.Y. App. Div. 1st Dep't 1983); see also Restivo v. Village of Lynbrook, 444 N.Y.S.2d 189, 190 (N.Y. App. Div. 2d Dep't 1981) (defendants' consent to numerous § 50-h adjournments does not establish a waiver of defendants' right to examine plaintiff prior to the commencement of the action).

Moreover, the scheduling issues alleged by plaintiff are by no means unique, and regularly result in dismissal of a claimant's state law claims, not waiver of the City's entitlement to the hearing. For example, in Gilliard, the plaintiff claimed "that after receiving notice of the 50-h Hearing, his then-counsel received an adjournment from a member of the Comptroller's Office by phone, but the hearing was never rescheduled." 2013 U.S. Dist. LEXIS 18180, at *54.

The district court held that the plaintiff's failure to attend the hearing—"no matter the reason"—was a complete bar to bringing state law claims against the City. Id. at 56. In Simon, the plaintiff requested an adjournment of the initial 50-h hearing, then failed to appear for the adjournment date, claiming that the "defendants failed to reschedule or notify [her] of a new hearing date." 2011 U.S. Dist. LEXIS 9515, at *56 n.17. The court ruled that the state claims were precluded whether or not plaintiff received the notice of the rescheduled hearing. Id. Similar rulings occurred in Buie where plaintiff argued that she never received the notice because it was sent to her previous attorney, 2015 U.S. Dist. LEXIS 147642 at *16, and in Marino where plaintiff claimed that defendants rescheduled the hearing without his consent, 2012 U.S. Dist LEXIS 78661 at *29. Finally, in Maggio—a case with a procedural posture nearly identical to the present one—the district court dismissed the state law claims where the plaintiff requested four adjournments of the 50-h hearing then chose not to appear for the final scheduled date because his civil action had already been commenced. 810 F. Supp. at 52.

Here, it is undisputed that plaintiff filed suit against the City without first appearing for a 50-h Hearing. This is a clear failure to comply with the relevant provisions of the GML. As it is over one year and ninety days from the date of the underlying incident, the time for initiating new state law claims has run. Accordingly, plaintiff's state law claims against the City must be dismissed.

CONCLUSION

WHEREFORE, the City respectfully requests that an order and judgment be entered dismissing plaintiff's claims for injunctive and declaratory relief, for punitive damages, and for false arrest and assault and battery, together with costs, fees, disbursements, and granting them such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 2, 2016

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for the City of New York
100 Church Street
New York, New York 10007

By: /s/

Elizabeth DeGori
(212) 356-3586
edegori@law.nyc.gov

Jeffrey Loperfido
(212) 356-2834
JLoperfi@law.nyc.gov

Carolyn Kruk
(212) 356-0893
ckruk@law.nyc.gov

Assistant Corporation Counsel